IT IS SO ORDERED.

Kay Woods
Honorable Kay Woods
United States Bankruptcy Judge

Dated: November 30, 2007
01:02:48 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	
JOHN SEIDNER,	**CASE NUMBER 07-41149**
Debtor.	
DAVE KEMP, *et al.*,	**ADVERSARY NUMBER 07-4123**
Plaintiffs,	**HONORABLE KAY WOODS**
vs.	
JOHN SEIDNER,	
Defendant.	

MEMORANDUM OPINION REGARDING DEFENDANT'S MOTION TO DISMISS AND REQUEST FOR SANCTIONS AND ATTORNEY FEES
Not Intended For National Publication

The following Memorandum Opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

On September 10, 2007, Plaintiffs filed Complaint of Plaintiff's to Determine the Dischargability of Debts ("Complaint"). Before the Court is Motion to Dismiss and Request for Sanctions and Attorney Fees ("Motion to Dismiss") (Doc. # 2), filed by Defendant John Seidner ("Debtor") on September 17, 2007. Debtor argues that Plaintiffs are precluded from relitigating in this Court issues of Debtor's fraudulent conduct because those issues were previously decided in the Journal Entry granting partial summary judgment in favor of Debtor ("Journal Entry") issued July 20, 2006, in the Medina County Court of Common Pleas ("Medina Court") in the case styled *Kemp v Reno*, Case No. 04-CIV-0171. On October 5, 2007, the Plaintiffs in this Adversary Proceeding filed Brief in Opposition to Motion to Dismiss and Request for Sanctions and Attorney Fees ("Brief in Opposition") (Doc. # 7). In their Brief in Opposition, Plaintiffs argue that the Journal Entry was not a final order pursuant to OH. R. CIV. P. 54(B) and, thus, has no preclusive effect in this adversary proceeding.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(H) and (I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. Facts

In 2004, Plaintiffs filed a complaint in the Medina Court against numerous defendants, including Debtor, alleging those defendants conspired in what Plaintiffs described as a "flipping scheme." (*See* Compl. ¶¶ 7, 35.) Plaintiffs' complaint in the Medina Court case alleged, among other claims, that Debtor made false representations to Plaintiffs and committed fraud while acting as an escrow agent and in a fiduciary capacity. (*See generally* Compl.) On July 20, 2006, the Medina Court issued the Journal Entry granting partial summary judgment in favor of Debtor on issues of fraud, conspiracy and RICO violations. (Brief in Opp. Ex. C at unnumbered 2.) Although the Medina Court found that genuine issues existed as to whether Debtor's conduct was negligent, or a breach of his fiduciary duty, that court specifically held that "there is no material issue of fact regarding whether [Debtor] committed fraud, . . ." and "[t]his Court believes, and finds, that [Debtor] did not." *Id.*

On May 16, 2007, Debtor filed a voluntary petition under chapter 7 of the Bankruptcy Code, but failed to schedule any debts owing to Plaintiffs. Plaintiffs assert that they have a contingent claim against Debtor based on the Medina Court lawsuit, which is listed in the Statement of Financial Affairs.[1] (Compl. ¶ 4.) Plaintiffs argue that this contingent debt is not dischargeable under, alternatively, (i) 11 U.S.C. § 523(a)(2)(A), false representations or actual fraud, (ii) section 523(a)(4), fraud committed while acting in a fiduciary capacity, or (iii) section 523(a)(6), because Debtor committed "egregious acts [which] caused willful and malicious injury to the Plaintiffs." (Id. ¶¶ 36-38).

In the Motion to Dismiss, Debtor argues that, because the Medina Court, "after extensive discovery, briefings and arguments found that no fraud existed in the dealings of Debtor/Defendant with Plaintiffs, th[e] Complaint should be dismissed with prejudice." (Mot. to Dismiss at 2.) Debtor further requests that the Court sanction Plaintiffs for their conduct, stating that "as Counsel who filed th[e] Complaint on behalf of Plaintiffs was the same Counsel involved in the Medina [Court] case and knew of this finding, the filing of the Complaint is merely to harass this Debtor and therefore, Plaintiffs should be sanctioned . . . ." *Id.*

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[1]Plaintiffs claim in their Complaint that "Plaintiffs were not listed as creditors on the Schedule F filed by [Debtor] as required by law, but instead were listed as a pending lawsuit on the Statement of Financial Affairs." (Compl. ¶ 4.) It is this contingent liability that Plaintiffs claim is nondischargeable.

Plaintiffs counter in the Brief in Opposition that the Medina Court's Journal Entry "was not made a final appealable Order." (Brief in Opp. at 2.) Therefore, "Plaintiffs' claims are not ripe for appeal[, but] the Plaintiffs fervently believe these claims will be overturned on appeal, as there exists a question of fact as to whether or not [Debtor] committed fraud, ..." (*Id*. at 2-3.) Plaintiffs further argue that: (i) the lack of a final judgment in the Medina Court case does not preclude Plaintiffs from filing an adversary complaint, and (ii) Plaintiffs have pled sufficient facts to survive a Rule 12(b)(6) motion to dismiss. (*Id*. at 3-5.)

II. ANALYSIS

Generally, "[t]he doctrine of collateral estoppel precludes relitigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action." *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 461 (6th Cir. 1999) (quoting *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)). Collateral estoppel doctrine is applicable in bankruptcy proceedings to determine dischargeability of debts to the extent the elements required for discharge are identical to the elements actually litigated and determined in the prior case. *See Grogan v. Garner,* 498 U.S. 279, 284-85 (1991).

Pursuant to the Full Faith and Credit Statute, 28 U.S.C. § 1738, bankruptcy courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). *See also Sill v. Sweeney* (*In re Sweeney*), 276 B.R. 186, 189 (B.A.P. 6th Cir. 2002) ("The full faith and credit principles of 28 U.S.C. § 1738 require us to look to state law to determine whether the Ohio courts would give preclusive effect to the judgment in question[.]"). In Ohio, the following elements must be established to apply the doctrine of collateral estoppel:

> 1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; 2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment; 3) The issue in the present suit must have been identical to the issue in the prior suit; [and] 4) The party against whom estoppel is sought was a party or in privity with a party to the prior action.

Gonzalez v. Moffitt (In re Moffitt), 252 B.R. 916, 921 (B.A.P. 6th Cir. 2000) (quoting *Murray v. Wilcox* (*In re Wilcox*), 279 B.R. 411, 415-16 (Bankr. N.D. Ohio 1998)).

Furthermore, Ohio recognizes that collateral estoppel applies to issues decided on summary judgment. *A-1 Nursing Care of Cleve. v. Florence Nightingale Nursing Inc.*, 647 N.E.2d 222, 224 (Ohio Ct. App. 1994) ("Summary Judgment terminates a party's action on the merits and a subsequent filing of an action decided on summary judgment is prohibited by the doctrine of *res judicata*[2][.]”). *See also* 63 OHIO JUR. 3D *Judgments* § 439 (2007) (“As a general rule, the doctrine of res judicata applies to [summary judgments]. . . . [T]he inquiry is as to whether the issue was in fact presented for decision and necessarily decided; if so, the issue is treated as res judicata, even though [it] is the determination of a motion or summary proceeding . . . .”).

Civil Rule 54(B) governs the finality of judgments in Ohio, and reads (in pertinent part):

> **Rule 54 Judgments; costs**
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> * * *
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> **(B) Judgment upon multiple claims or involving multiple parties.**
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> When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties*, and the order or other form of decision is subject to revision at any

[2]The Court acknowledges the distinction between res judicata, or claim preclusion, and collateral estoppel, or issue preclusion; however, “[i]n Ohio, res judicata embraces the doctrine of collateral estoppel.” *W. Res. Group v. Hartman*, Lorain App. No. 04CA8451, 2004-Ohio-6083, at ¶13 (quoting *Ohio Cas. Ins. Co. v. Hamel*, 445 N.E.2d 251, 253 (Ohio Ct. App. 1981)).

> time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

OHIO R. CIV. P. 54(B) (West 2007) (emphasis added). The Supreme Court of Ohio, in *Jarrett v. Dayton Osteopathic Hosp., Inc.*, 486 N.E.2d 99, 100 (Ohio 1985) held "[a]n entry of judgment involving fewer than all of the claims or parties is not final unless the court expressly determines that there is 'no just reason for delay.'" *See also Brown v. McCurdy*, 657 N.E. 2d 847, 850 (Ohio Ct. App. 1995) ("Unless the court expressly determines that there is 'no just reason for delay,' an entry of judgment involving fewer than all of the claims or parties is not final.").

Since the Journal Entry does not adjudicate all of the claims against Debtor, much less all claims against all parties, it must contain the Ohio Civil Rule 54(B) language "no just reason for delay" in order to have preclusive effect in this adversary proceeding.[3] It does not.

III. CONCLUSION

Because the Journal Entry of the Medina Court in the case *Kemp v. Reno*, Case No. 04-CIV-0171, granting partial summary judgment in favor of Debtor on issues of fraud, does not contain the language

[3]In addition, the Motion to Dismiss must be denied for the separate reason that the Complaint is based, in part, on § 523(a)(4) and acts that Debtor allegedly committed in his fiduciary capacity. (Compl. ¶¶ 23, 27, 37.) The Journal Entry specifically held that Debtor was not entitled to summary judgment on the causes of action based on violation of fiduciary duty. As a consequence, because the Complaint pleads facts sufficient to state a cause of action pursuant to § 532(a)(4), the Motion to Dismiss must be denied even if, *arguendo*, this Court found the Journal Entry to be a final appealable order, since the fiduciary duty claims were not "necessarily decided" in the Journal Entry.

"no just reason for delay," pursuant to Ohio Civil Rule 54(B) it is not a final appealable order. As it is not a final appealable order, it can have no preclusive effect in this adversary proceeding. Debtor's Motion to Dismiss is, therefore, denied. Accordingly, the Court imposes no sanctions on Plaintiffs.

An appropriate Order will follow.

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